

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : NO. 97-CR-612-2
 :
 v. :
 :
 THOMAS PILEGGI :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

JUNE 2, 1998

I. FACTS

Thomas Pileggi, the defendant in this case, is charged with trading as an insider in violation of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78ff(a), and the regulations promulgated pursuant thereto, 17 C.F.R. § 204.10b-5, and with wire fraud in violation of 18 U.S.C. § 1343, based on three separate purchases of Independence Bancorp Inc. ("INBC") stock shortly before the public announcement of the proposed merger between INBC and CoreStates Financial Corp.

("CoreStates"). At the time of the purchases, defendant was a member of the Board of Directors of Cheltenham Bank, a wholly-owned subsidiary of INBC. Before the Court¹ is defendant's motion in limine to preclude the admission of evidence that defendant's brother Joseph Pileggi and defendant's nephew John Pileggi, Jr. also purchased INBC stock shortly before the announcement of the merger between INBC and CoreStates and sold the stock shortly after the merger was publicly announced on

¹ This memorandum explains the Court's ruling made from the bench on May 27, 1998.

November 19, 1993 at 3:47 p.m.

Specifically, the Government seeks to introduce evidence that: (1) Joseph Pileggi purchased 10,000 shares on November 18, 1993, sold 5,000 shares on November 19, 1998 and 5,000 shares on November 21, 1998, and made a profit, and that (2) John Pileggi purchased 400 shares on November 17, 1993, sold those shares on November 30, 1998, and made a profit. The Government also proffers evidence that Joseph Pileggi purchased the stock through the same broker as defendant, that John Pileggi, Jr. purchased the stock through a discount brokerage firm, that purchases of INBC stock by both relatives were unsolicited, and that these relatives had no history of trading in INBC at any time in 1993 prior to the purchases in question. The Government contends that the timing and circumstances of these purchases, which were parallel to the purchases made by defendant in question in this case, and the relationship of the nephew and brother to defendant, give rise to an inference that the defendant possessed material nonpublic information concerning the potential merger between INBC and CoreStates and that he traded based upon that information. Defendant contends that the inference the Government seeks to draw creates a danger of unfair prejudice to defendant because defendant is not charged as a "tipper" in this case, that the exploration of this issue would cause confusion to the jury and delay to the proceedings and, therefore, should not be admitted.

II. DISCUSSION

A. Legal Standard

According to Federal Rule of Evidence 403 ("Rule 403"),² relevant evidence is admissible provided its probative value is not substantially outweighed by the danger of unfair prejudice.³ Fed. R. Evid. 403; United States v. Sriyuth, 98 F.3d 739, 747 (3d Cir. 1996). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 117 S.Ct. 644, 650 (1997). Rule 403 "calls for 'balancing the probative value of and need for the evidence against the harm likely to result from its admission.'" United States v. Gatto, 995 F.2d 449, 456-57 (3d Cir.) (quoting Fed. R. Evid. 403, committee note), cert. denied, 510 U.S. 948, 114 S.Ct. 391, 126 L.Ed.2d 339 (1993). The Third Circuit has observed that "[i]n applying this test, we must assess the 'genuine need for the challenged evidence and balance that

² Rule 403 provides:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
Fed. R. Evid. 403.

³ The Federal Rules of Evidence embody a preference for the admissibility of evidence. See 2 Weinstein & Berger, Weinstein's Federal Evidence § 403.02[2][c] (2d ed. 1998). Rule 403, therefore, is properly viewed as a rule of admissibility, rather than exclusion.

necessity against the risk that the information will [improperly] influence the jury " United States v. Sriyuth, 98 F.3d 739, 747-48 (3d Cir.1996) (quoting United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988)), cert. denied, 117 S.Ct. 1016 (1997). The factors to be considered in the balancing process are: "the actual need for that evidence in view of the contested issues and the other evidence available to the [party seeking admission], and the strength of the evidence in proving the issue, against the danger that the jury will be inflamed" Id. at 748 (quoting United States v. Cook, 538 F.2d 1000, 1003 (3d Cir. 1976) (internal quotations and citations omitted)). See, e.g., United States v. Carter, 966 F. Supp. 336 (E.D. Pa. 1997) (Robreno, J.); United States v. Ellis, No. 95-4354, 1997 WL 337040 (E.D. Pa. May 22, 1997) (Robreno, J.).

B. Applicable Factors⁴

1. Actual need for, and strength of, the evidence and available alternatives

"Proof of scienter required in [securities] fraud cases is often a matter of inference from circumstantial evidence." Herman & MacLean v. Huddleston, 459 U.S. 375, 390-391 n. 30 (1983); SEC v. Singer, 786 F. Supp. 1158, 1164 (S.D.N.Y. 1992) (quoting SEC v. Bluestone, No. 90-72525, 1991 WL 83960, at *1

⁴ An analysis under Rule 403 begins with a determination that the evidence is "relevant" under Rule 401, that is it has a "tendency to make the existence of any fact that of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In this case, there has been little dispute as to the relevance of the evidence proffered.

(E.D.Mich. Jan. 24, 1991); SEC v. Musella, 748 F. Supp. 1028, *1038 (S.D.N.Y. 1989); SEC v. Moran, 922 F. Supp. 867, 890 (S.D.N.Y. 1996). Evidence of "suspicious timing" of trades, inter alia, is probative of intent. Singer, id. (citing SEC v. Musella, 578 F. Supp. 425, 441 (S.D.N.Y. 1984)). Therefore, the proffered evidence of parallel trading by blood relatives is important to satisfy the Government's burden on an essential element of the crime. On the other hand, there are few, if any, evidentiary alternatives available to the Government to prove intent.

Defendant contends that the evidence may cause the jury to believe that defendant "tipped" his relatives, a crime with which he is not charged. The Court disagrees. Rather, the evidence is not offered to show that the defendant "tipped" his relatives, but rather that the suspicious pattern and timing of the trades by defendant's blood relatives permits a reasonable inference to be drawn that defendant possessed inside information.⁵

2. Danger of inflaming the jury

Prejudice alone is not sufficient to warrant exclusion under Rule 403. See 2 Weinstein & Berger, Weinstein's Federal Evidence § 403.04[1][a] (2d ed. 1998). "'Virtually all evidence is prejudicial; or it isn't material. The prejudice must be unfair' [to warrant exclusion under Rule 403]." McQueeney v.

⁵ The Court has advised the parties that it will provide a limiting instruction to the jury on this point.

Wilmington Trust Co., 779 F.2d 916, 923 (3d Cir. 1985) (quoting Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613 (5th Cir. 1977)).

The Third Circuit has "noted that a significant danger of undue prejudice will be found to exist where there are 'substantial possibilities . . . that a jury will harbor strong adverse sensitivity to the challenged evidence.'" Sriyuth, 98 F.3d at 748 (quoting Cook).

The evidence the Government seeks to introduce is not inherently inflammatory. Unlike many of the cases cited by defendant,⁶ the Government does not seek to introduce evidence involving violent or socially repugnant conduct committed by defendant. Therefore, the use of this evidence is not unfair to defendant.

C. Other Factors

Defendant also contends that the proffered evidence, even if not unfairly prejudicial, is excludable under Rule 403, because it injects "collateral issues" into the proceedings, and causes confusion and undue delay. Defendant claims that the Government's evidence will open the door to "mini trials" involving the other parties' transactions. Moreover, defendant

⁶ See Old Chief, 117 S.Ct. 644 (considering evidence of name and nature of defendant's prior conviction for assault causing serious bodily injury); Sriyuth, 98 F.3d 739 (considering evidence that the defendant who was charged with kidnapping raped the victim); United States v. Palumbo, 639 F.2d 123 (3d Cir. 1981) (in a prosecution for conspiracy to possess and distribute cocaine, considering admission of cocaine taken from an unindicted co-conspirator); United States v. Simpson, 910 F.2d 154 (4th Cir. 1990) (considering admission of testimony regarding a drug courier profile).

contends that the testimony of the Government's witnesses on the issue of whether the purchases were unsolicited will be contradicted by the defendant's witnesses. The Court disagrees. Because an issue is contested by the parties or calls for the determination of questions of credibility by the jury does not mean that it is collateral. Nor should the inquiry into these issues be lengthy. The evidence needed to determine the circumstances surrounding the brother's and the nephew's transactions will consist of the testimony of one or two witnesses. This testimony will be limited in time and scope and should not cause labyrinthian explorations by either side. Therefore, the Court concludes that the probative value of the testimony is not substantially outweighed by the likelihood of confusion or delay.

III. CONCLUSION

The Court finds that evidence of the brother's and the nephew's trades is properly admissible under Rule 403 because it is relevant, there is an actual need for it, and no alternatives are available for the evidence offered, the evidence is significantly probative to the Government's charge that defendant possessed the requisite scienter, and lastly, on balance, the evidence is neither inflammatory nor likely to cause confusion or delay.